88-1311

No. _____

FILED
FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

KEN BOURLAND, INDIVIDUALLY and as ADMINISTRATOR OF THE ESTATE OF JODI BOURLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

*William H. Sutton and
Kevin A. Crass

Friday, Eldredge & Clark
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

QUESTIONS PRESENTED

1. Whether a state court can, after remand of a case from federal district court, enter default judgment against a party that removed the case to federal district court and filed a timely Answer in federal district court?

2. Whether a violation of due process occurs when a state court holds a party in default who has timely answered in federal court pursuant to the federal removal statutes?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner Allstate Insurance Company and the Respondent Ken Bourland, Individually and as Administrator of the Estate of Jodi Bourland, Deceased. Allstate Insurance Company is wholly owned by Sears Roebuck and Co.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Hatchett, 91 Ga. App. 571, 86 S.E.2d 662 (1955) 14

Ayres v. Wiswall, 112 U.S. 187, 5 S.Ct. 90, 28 L.Ed. 693 (1884) 15, 16

Barrett v. Southern Railway Co., 68 F.R.D. 413 (D.C. S.C. 1975) 11

Berberian v. Gibney, 514 F.2d 790 (1st Cir. 1975) 12

Brock v. North Carolina, 344 U.S. 424, 427, 97 L.Ed. 456, 549, 73 S.Ct. 349 (1953) 19

Carnagie Mellon University v. Cohill, 484 U.S. ___, 98 L.Ed.2d 720, 108 S.Ct. ___ (1988) 11

Dauenhauer v. Supreme Court, 307 P.2d 724 (Calif. 1957) 14

Edward Hansen, Inc. v. Kirney P.O. Associates, 166 N.J. 161, 399 A.2d 319 (1979) 14, 15

General Electric Credit Corp. v. Smith, 484 So.2d 75 (1986) 14

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 31 L.Ed.2d 612, 92 S.Ct. 1344 (1972) 11

Hornung v. Master Tank & Welding Co., 151 F.Supp. 169 (D.C. N.D. 1957) 9

In Re Gault, 387 U.S. 1, 20, 18 L.Ed.2d 527, 542, 87 S.Ct. 1428 (1967) 17

Kromer v. McNabb, 308 F.2d 863 (10th Cir. 1962) 18

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24, 68 L.Ed.2d 640, 648, 101 S.Ct. 2153 (1981) 19

Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co., 395 P.2d 477 (S.Ct. Ida. 1964) 14

TABLE OF AUTHORITIES–Continued

Page

Manufacturers and Tradings Trust Co. v. Hartford Accident and Indemnity Co., 434 F. Supp. 1053 (W.D. N.Y. 1977) 9

Matthews v. Eldredge, 424 U.S. 319, 334, 47 L.Ed.2d 18, 33, 96 S.Ct. 893 (1976) 19

Mayberry v. Pennsylvania, 400 U.S. 455, 465, 27 L.Ed.2d 532, 540, 91 S.Ct. 499 (1971) 17

Roberts v. New York, 295 U.S. 264, 277, 79 L.Ed. 1429 (1935) 18

Wolff v. McDonald, 418 U.S. 539, 558, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974) 17

STATUTES:

28 U.S.C. §1332 5

28 U.S.C. §1446 ..... 3, 5, 7, 9, 12

28 U.S.C. §1447 ..... 3, 9, 16

OTHER AUTHORITIES:

Fed. R. Civ. Proc. 81 7

Ark. R. Civ. Proc. 12 9

Ark. R. Civ. Proc. 55 10

No. _____

In The

Supreme Court of the United States

October Term, 1988

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

KEN BOURLAND, INDIVIDUALLY and as ADMINISTRATOR OF THE ESTATE OF JODI BOURLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The Petitioner Allstate Insurance Company respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Arkansas, entered in the above-entitled proceeding on October 19, 1988. The Supreme Court of Arkansas denied Petitioner's Petition for Rehearing on November 7, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 296 Ark. 488, 758 S.W.2d 700, and is reprinted in the Appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Arkansas (Woods, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. 14a, *infra*.

The Order and Judgment of the Circuit Court of Craighead County, Arkansas were not reported. They are reprinted in the Appendix hereto, pp. 16a and 18a, *infra*.

JURISDICTION

On July 24, 1987, the United States District Court for the Eastern District of Arkansas remanded this case to the Circuit Court of Craighead County, Arkansas. On August 6, 1987, the Circuit Court of Craighead County, Arkansas entered Default Judgment. On October 10, 1988, the Supreme Court of Arkansas affirmed the Default Judgment refusing to give effect to the timely filed Answer in federal court. The Supreme Court of Arkansas denied the Petition for Rehearing on November 7, 1988.

The jurisdiction of this Court to review the judgment and the Opinion of the Supreme Court of Arkansas is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

. . .

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant of defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process

to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk the the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On April 22, 1987, the petitioner was sued by the respondent in the Circuit Court of Craighead County, Arkansas. On May 21, 1987, within the time allowed for responsive pleadings and removal proceedings, petitioner filed a Petition for Removal to federal court, Notice of Removal, Bond and Answer with the United States District Court for the Eastern District of Arkansas. Petitioner had the right to remove the case to federal court

because complete diversity of citizenship existed and the amount in controversy was in excess of $10,000. *See* 28 U.S.C. § 1332(a). Copies of these pleadings were mailed to the respondent's attorney, who does not dispute receipt. Copies of the Petition for Removal and the Notice of Removal were placed in the mail to the Circuit Clerk for Craighead County, Arkansas. This initial mailing to the Circuit Clerk was not received by the Circuit Clerk as the pleadings were not filed in the state court case until later.

On or about June 16, 1987, petitioner's counsel was informed by respondent's attorney that responsive pleadings were not on file with the state court. On June 17, 1987, copies of the Petition for Removal, Notice of Removal, Bond and Answer were filed with the state court clerk. On June 19, 1987, respondent filed a Motion for Default Judgment in state court. On June 25, 1987 respondent filed a Motion in federal court seeking remand of the case to state court for improper removal. The basis of the Motion to Remand was that the removing party did not comply with the requirements of 28 U.S.C. § 1446(e) to promptly file a copy of the Petition with the clerk of the state court promptly after the filing of the Petition for Removal. On June 24, 1987 the United States District Court for the Eastern District of Arkansas entered an Order remanding the case to the Circuit Court of Craighead County, Arkansas. On August 6, 1987, the Circuit Court of Craighead County, Arkansas entered an Order granting respondent's Motion for Default Judgment. On September 4, 1987 Petitioner filed a Motion to Set Aside Default Judgment which Motion was denied on September 21, 1987.

For easy reference, the following is a chronology of the filings in this case:

April 22, 1987	Complaint filed in state court
May 21, 1987	Answer filed in federal court Removal papers filed in federal court Removal papers mailed to Circuit Clerk and Plaintiff's Attorney
June 17, 1987	Answer and Removal papers filed in state court
June 19, 1987	Plaintiff's Motion for Default Judgment in state court
June 25, 1987	Plaintiff's Motion for Remand filed in federal court
July 24, 1987	Order of Remand entered by federal court
August 6, 1987	Order of Default Judgment entered by state court
September 4, 1987	Motion to Set Aside Default Judgment
September 21, 1987	Order Denying Motion to Set Aside Default Judgment
October 8, 1987	Judgment entered by state court

Petitioner appealed the entry of default judgment to the Supreme Court of Arkansas. By decision dated October 10, 1988, the Supreme Court of Arkansas affirmed the entry of default judgment. On November 7, 1988, the Supreme Court of Arkansas denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE STATE COURT TO RECOGNIZE AND ACCEPT RESPONSIVE PLEADINGS FILED IN FEDERAL COURT DEFEATS A PARTY'S FEDERAL RIGHT TO REMOVE A CASE TO FEDERAL COURT AND THE PARTY'S FEDERAL RIGHT TO DEFEND A COMPLAINT.

A state court defendant's right to remove a case from state court to federal court is based exclusively upon federal statutes, rules and decisions. In particular, the procedure for removal is found at 28 U.S.C. § 1446 which provides that a defendant may remove a civil action within thirty days after receipt by the defendant of a copy of the initial pleading setting forth the claim for relief. The statutes require the defendant to file a Petition for Removal in the District Court of the United States for the district and division within which the action is pending. The petition is to contain a short and plain statement of the facts which entitled him to removal together with a copy of all process, pleadings and orders served upon the defendant.

In 28 U.S.C. § 1446(e), the removing party is required to give written notice to the adverse parties and to file a copy of the Petition with the clerk of the state court from which the case is being removed. The statute does not establish a specific deadline but merely requires that this notice and filing be done "promptly after the filing of such Petition for Removal."

Federal Rule of Civil Procedure 81(c) establishes the time in which a defendant/removing party must answer

or file, in federal court, other responsive pleadings to the initial Complaint. The Rule provides, in pertinent part, that:

> In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the Petition for Removal, which ever period is longest.

While the rules contemplate that in some removed cases the parties will have previously answered or responded to the Complaint, there are no requirements in the federal rules that a removing defendant file a responsive pleading in state court prior to a removal of the case to federal court.

The Petitioner removed this case from the Circuit Court of Craighead County, Arkansas to the United States District Court for the Eastern District of Arkansas. The Petitioner, pursuant to the previously described rules, timely filed a Petition for Removal, a Notice of Removal, a Bond and an Answer with the District Court. Petitioner's counsel mailed a copy of the Notice of Removal and Petition for Removal to the Clerk of the Circuit Court of Craighead County, Arkansas but the initial mailing was not received. Respondents' counsel received a copy of all the pleadings that were mailed to him. Before any action was taken by the state court, however, Petitioner filed with the state court clerk a copy of the Petition for Removal, Notice of Removal and an

Answer which had been previously filed in federal court. This filing was accomplished on the 26th day following the filing of the Petition for Removal in federal court. Despite this filing which completed removal of the case to federal court, Petitioner was faced with a Motion for Default Judgment in state court for failure to file responsive pleadings within the 30 day period allowed by the state rules. *See* Arkansas Rule of Civil Procedure 12. During the pendency of the Motion for Default Judgment in state court, Petitioner was confronted with a Motion to Remand in the federal district court. The Motion to Remand was based solely upon the notion that the Petitioner had not filed a copy of the Petition for Removal and Notice of Removal with the state court clerk in a "prompt" manner as required by 28 U.S.C. § 1446(e). The United States District Court granted the Petition for Remand and ordered the case sent back to state court. Under 28 U.S.C. § 1447(d), the Order was not reviewable on appeal or otherwise in this case. As a result of the non-appealable nature of an Order of Remand, lower courts are not given guidance on what constitutes a "prompt" filing under 28 U.S.C. § 1446(e). While the district court herein concluded that 26 days was not prompt, some courts have held that 14 day and 45 day delays were not grounds for remand. *See Hornung v. Master Tank & Welding Co.*, 151 F. Supp. 169 (D.C. N.D. 1957); *Manufacturers and Tradings Trust Co. v. Hartford Accident and Indemnity Co.*, 434 F. Supp. 1053 (W.D. N.Y. 1977). The recognition by some courts that a delay should not bar further proceedings is at least partially based upon the notion that the sole purpose of the notice requirement of 1446(e) is to give actual notice to the

adverse parties and the state court that the case has been removed. Such a purpose was satisfied in this case.

Upon remand of this case to the state court, the state court concluded that since no responsive pleadings were filed in state court within the period allowed by the Arkansas Rules of Civil Procedure, the Court was required to enter default judgment pursuant to Arkansas Rule of Civil Procedure 55. On appeal, the Supreme Court of Arkansas was asked to require the lower court to give effect to the Answer which had been timely filed in federal court prior to remand and the Supreme Court was also asked to adopt a rule which would toll the period in which a state court defendant must answer. The Court was requested to toll the running of the deadline from the date the Petition for Removal was filed until the case was remanded to state court. In both instances, the Supreme Court of Arkansas refused and affirmed the default judgment. The Supreme Court of Arkansas recognized that a change in the federal law in 1949 removed the risk of default a party had previously borne when removing the case to federal court if the state court filing requirements were not met. Despite recognition of this change, the Supreme Court of Arkansas made this risk a reality for the Petitioner by affirming the default judgment. The Supreme Court of Arkansas relied heavily upon its own view of the federal removal statutes that removal is not "effected" unless the removal papers are filed with the state court. Further, the court stated, "We are certainly not required by Federal law to give the Answer filed in Federal Court the effect of meeting the filing deadline required by our rule, so we look to our own policy." The

opinion erroneously concluded removal was not "effected" herein.

As this Honorable Court recognized some time ago, "While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statute and decisions of this Court are intended to have uniform nationwide applications." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L.Ed.2d 612, 92 S.Ct. 1344 (1972). Further, the court determined in that decision that federal, not state, law governs all removal proceedings. *See also Barrett v. Southern Railway Co.*, 68 F.R.D. 413 (D.C. S.C. 1975).

This Petition should be granted because federal district courts and state courts need a uniform nationwide rule in cases involving remand of a case from federal court to state court. The need for a uniform rule is buttressed by the recent liberalization of a federal district court's discretion to remand cases to state court. See *Carnagie Mellon University v. Cohill*, 484 U.S. ___, 98 L.Ed.2d 720, 108 S.Ct. ___ (1988). (This Court concluded that a federal district court has discretion under the doctrine of pendent jurisdiction to remand a properly removed case to state court when all federal-law claims in the action have been eliminated and only pendent state-law claims remain.) State trial courts are likely to ignore pleadings filed in federal court once the case is remanded.

This case illustrates the unjust result of the lack of a uniform rule on this issue. Because of the structure of the removal procedures, the issue yearns for this Court to

give guidance to federal and state courts in every jurisdiction. Initially, it should be noted that defendants are often faced with a conflict between the time within which an answer might be due in state court and the amount of time within which the federal statutes give a defendant the right to remove a case to federal court. Technically, a defendant could respond to a state court complaint within twenty days even though it later files a timely petition for removal after the twenty day period had expired. The issue in this case arises because of an overlap in jurisdiction which often occurs when the filing of the pleadings in federal court and the filing of the pleadings in state court are not simultaneous. Obviously, 28 U.S.C. § 1446(e) does not contemplate nor require that simultaneous filings will be made. When a delay does occur, an overlap in jurisdiction between the state and federal court exists as described in *Berberian v. Gibney*, 514 F.2d 790, 792 (1st Cir. 1975):

> It is clear that once a removal petition has been filed and proper notice given adverse parties and the state court, the district court has exclusive jurisdiction over the case. But what of the lapse between the filing of the petition in federal court and its filing in state court and notice to the opposing party? The default against appellee in this case was entered by the state court six days after the removal petition was filed in the district court and three days before the petition was filed with the state court.
>
> It may be argued that since the burden of the requirement in § 1446(e) that, 'promptly after' filing, notice be given to adverse parties and to the state court falls upon the party seeking removal, the risk attendant upon tardy compliance, including intervening action defeating federal jurisdiction, should fall upon him as well. But, in all those jurisdictions requiring a

> defendant to answer a complaint in less than 30 days, such an interpretation would eviscerate the language of § 1446(b), permitting a defendant 30 days to remove. Moreover, it would emphasize the technical compliance with terms of the statute to the detriment of its central purpose. The function of the removal statutes, 28 U.S.C. § 1441-1450, is to provide a simple means, uniformly applied irrespective of state rules, for defendants entitled to do so to remove actions from state and federal court. Thus, we are inclined to agree with Professor Moore, that the jurisdiction of the federal court attaches a soon as the petition for removal is filed with it, and that both state and federal courts have jurisdiction until the process of removal is completed. Citing 1A. Moore ¶0.168 [3.-8], at 509-511.

514 F.2d 792-793. In the section from Professor Moore's treatise cited above, the noted commentator stated:

> In the interim between the filing of the removal petition in the federal district court and the fulfillment of the foregoing requirements, what is the respective jurisdiction of the federal district court and the state court? The jurisdiction of the federal district court attaches when the removal petition is filed with it, and it may validly take action in the case during the interim period.

Under this view of the law, when the removal pleadings were filed with the state court clerk, albeit twenty-six days past the filing in federal court, the federal court obtained exclusive jurisdiction which extended retroactively to the day the petition was filed with the federal clerk. During this period of exclusive jurisdiction in federal court, the respondent filed a Motion for Default Judgment in state court. The state court delayed a ruling until a date after the order of remand although the state court delay was not in deference to the federal court.

Rather, it was a delay based upon Petitioner's request for time to brief the issues in state court. There is a conflict of decisions among the states as to how to deal with this problem. Some courts have held that the time period for complying with state filing deadlines is tolled during the interim between petition for removal and an order of remand. *See General Electric Credit Corp. v. Smith,* 484 So.2d 75 (1986); *Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co.,* 395 P.2d 477 (S.Ct. Ida. 1964); *Dauenhauer v. Supreme Court,* 307 P.2d 724 (Calif. 1957); *Allen v. Hatchett,* 91 Ga. App. 571, 86 S.E.2d 662 (1955). These decisions all hold that the amendment of the Federal Rules in 1949 eliminated the need for the removing party to comply with state court filing deadlines or risk default in the event the removal petition was not granted. The Supreme Court of Arkansas, lacking a uniform national rule, rejected these arguments and squarely put the risk of nonfiling upon the Petitioner.

Another conflict exists in that some state courts have held that the state courts should give effect to pleadings filed in federal court when the case is remanded to state court. In *Edward Hansen, Inc. v. Kirney P.O. Associates,* 166 N.J. 161, 399 A.2d 319 (1979), the New Jersey Appellate Court rejected the analysis of prior decisions placing the aforementioned risk on the removing party and stated:

> This rationale has been eliminated by a provision of the modern removal statute, 28 U.S.C.A. § 1446(e), which prohibits any proceeding in the State Court after removal and prior to remand. Any pleadings a party might try to file to preserve his rights in State Court would be void and of no affect . . . . This Court is of the opinion that the better rule favors giving continued affect to those pleadings. Adoption of the

> federal pleadings filed in this case would avoid the needless waste of time, effort and expense which would result from requiring counsel to duplicate in this Court their actions of the past six years in the Federal Court. Such an unnecessary duplication of effort alone indicates the preferability of adopting the federal pleadings.
>
> Additionally, the adoption of pleadings would result in the postremand procedure in this Court mirroring as nearly as possible the post removal procedure in the Federal Court. Upon removal, the entire record is delivered to the clerk of the Federal Court and that Court assumes its jurisdiction with the case in exactly the same position as when it was removed from the State Court. Adoption of the federal pleadings would result in this Court's renewing its jurisdiction with the case in exactly the same posture as when it was remanded from the Federal Court . . . . In conclusion, the pleadings filed in the District Court should be adopted as if they had originally been filed in this Court.

399 A.2d at 323. Again, the decision of the Supreme Court of Arkansas rejects this well-reasoned rule and calls for this Court to establish such a rule for the benefit of state courts and federal courts in this country.

The New Jersey Court in *Hansen*, and the Arkansas Supreme Court below, concluded, based upon a decision by this Court in *Ayres v. Wiswall*, 112 U.S. 187, 5 S.Ct. 90, 28 L.Ed. 693 (1884), that state policy determines what effect, if any, a State Court will give federal pleadings upon remand. Petitioner respectfully suggests that this Court should reevaluate the *Ayres* decision in light of recent precedent, modern practice and the modern removal statutes. In the *Hansen* decision, the New Jersey court noted that "More recent federal cases have not

altered the rule announced in *Ayres* but have exhibited an expectation that the state court would on remand consider the entire case, including the federal pleadings." 399 A.2d at 321.

In *Ayres*, the Circuit Court of the United States concluded that a case that had been removed to federal court should be remanded because the federal court had *no* jurisdiction. In its order of remand the Circuit Court ordered "[t]hat the proceedings had thereon be and the same are hereby set aside and held for naught." In affirming the order of remand, the Supreme Court noted, "It will be for the State Court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction." Petitioner submits that application of *Ayres* by state courts in rejecting federal pleadings is misplaced. Further, 28 U.S.C. § 1447(c) provides that upon remand, "The state court may thereupon proceed with such case." The statutory language contemplates that the state court will proceed with the case previously pending. Perhaps a more important distinction from *Ayres* is that federal courts, as in this case, will remand a case in which jurisdiction was proper and in which proceedings prior to remand are not void. State courts should be required to accept the pleadings filed in federal court.

While the Supreme Court of Arkansas concluded federal law did not require it to give effect to the pleadings filed in federal court, a defendant's federal right to seek removal is infringed by state application of default judgments. This Court should declare a national uniform rule to protect the federal right of removal.

II.

THE ARKANSAS SUPREME COURT'S REFUSAL TO RECOGNIZE A TIMELY ANSWER FILED IN FEDERAL COURT ON REMAND VIOLATES SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that no persons shall be deprived of life, liberty, or property without due process of law. The courts have delineated two forms of due process: procedural, the required characteristics of proceedings seeking to effect a depirivation of life, liberty, or property; and substantive, the constitutional guarantee that no person will be deprived of life, liberty, or property for arbitrary reasons. The United States Supreme Court has never defined the term "due process" preferring to characterize the right as:

> The primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.

In Re Gault, 387 U.S. 1, 20, 18 L.Ed.2d 527, 542, 87 S.Ct. 1428 (1967).

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonald*, 418 U.S. 539, 558, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). Whether the trial be in a federal or state forum, the concern of due process is the fair administration of *justice. Mayberry v. Pennslyvania*, 400 U.S. 455, 465, 27 L.Ed.2d 532, 540, 91 S.Ct. 499 (1971).

There is no justice in the refusal by the Supreme Court of Arkansas to recognize the answer timely filed in federal court by Allstate either as tolling the statutory answer deadline in state court or as an acceptable pleading on remand. Through procedural and substantive errors, the Supreme Court of Arkansas has denied Allstate due process.

The Supreme Court of Arkansas has held it may ignore all pleadings timely filed in federal court after remand of the case to state court. However, the federal courts have stated that when a case is remanded from federal court to state court, it is remanded intact. *Kromer v. McNabb,* 308 F.2d 863 (10th Cir. 1962). This court must resolve the dispute which exists between the state courts and federal courts as to the effect of pleadings filed in federal court prior to remand. This a question of procedure.

As stated by Justice Cardozo:

> The Fourteenth Amendment is not a guarantee that a trial shall be devoid of error . . . to bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.

Roberts v. New York, 295 U.S. 264, 277, 79 L.Ed. 1429 (1935).

The Supreme court of Arkansas was given three options with respect to the fate of Allstate. It could: (1) treat the timely answer filed in federal court as tolling the state statutory answer time until after remand to state court; (2) accept the timely answer filed in federal court as effective on remand; (3) refuse to recognize that a

timely answer was filed in federal court and hold Allstate in default in state court.

The Supreme Court of Arkansas denied that the federal court ever had jurisdiction, refused to recognize the filings in federal court, and applied its own policy as to default, all the while acknowledging:

> Although it had appeared and defended in the federal court, it had not done so in state court.

Under the Federal Rules of Civil Procedure, Allstate appeared and defended and was never in default in federal court. The Supreme Court of Arkansas by refusing to recognize the litigation in federal court on remand arbitrarily deprives Allstate of its due process right to a fair adjudication on the merits and deprives it of its property without process at all.

No hard and fast rule can be laid down as to what is, or what is not, due process. *Brock v. North Carolina*, 344 U.S. 424, 427, 97 L.Ed. 456, 459, 73 S.Ct. 349 (1953). Due process is flexible and calls for such protections as the particular situation demands. *Matthews v. Eldredge*, 424 U.S. 319, 334, 47 L.Ed.2d 18, 33, 96 S.Ct. 893 (1976). But, the phrase itself expresses the requirement of fundamental fairness. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24, 68 L.Ed.2d 640, 648, 101 S.Ct. 2153 (1981).

It is patently unfair for a state court to disregard a timely filed federal answer on remand. It is procedurally and substantively unjust. It will continuously result in default against a party who admittedly timely appeared and defended in federal court at a time when that court had jurisdiction.

CONCLUSION

This Petition and case demonstrate the need for a national standard of uniform application to define and protect a defendant's right arising under the federal removal statute. This Petition recites the inexplicable conflict as different states grapple with the applicability of certain federal rights to state trial practice. It is the conflict in those state court decisions which makes certiorari proper.

While there is no specific definition of due process, it is a concept related to constitutional fairness. This fairness and its justice should not vary in result from Arkansas to New Jersey to Idaho and to Georgia as the decisions now permit. Absent a uniform, national rule, the federal right varies according to the boundaries and perceptions of the forum state. Due process is both too sacrosanct and too fragile to be so geographically illusory without the guidance of this Court's decision.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Petitioner

ALLSTATE INSURANCE COMPANY,
Appellant,

v.

Ken BOURLAND, Individually and as Administrator of the Estate of Jodi Bourland,
Appellee.

No. 88-26.

Supreme Court of Arkansas.

Oct. 10, 1988.

Insured under automobile policy brought action against insurer to recover uninsured motorist benefits. The Circuit Court, Craighead County, Olan Parker, Jr., J., entered default judgment for insured, and appeal was taken. The Supreme Court, Newbern, J., held that: (1) answer filed in federal court was not sufficient to satisfy rule requiring answer to be filed in state court within 30 days, and (2) insured was not entitled to attorney fees and penalty.

Affirmed.

Hays and Purtle, JJ., dissented and filed opinions.

William H. Sutton and Kevin A. Crass, Little Rock, for appellant.

David Rees, Jonesboro, for appellee.

NEWBERN, Justice.

This is a unique default judgment case. The appellee, Ken Bourland, sued the appellant, Allstate Insurance Company, alleging entitlement to uninsured motorist coverage with respect to an accident in which his daughter, Jodi Bourland, was killed. He sued as administrator

of the daughter's estate and individually for damages to a car owned by him. Allstate denied coverage, claiming it had notified Mr. Bourland of cancellation. As Allstate is a nonresident corporation, it had 30 days to answer the complaint. Ark.R.Civ.P. 12(a). The complaint was filed April 22, 1987. On May 21, 1987, an answer and removal petition were filed in a federal court. Nothing further was filed in the circuit court until June 17, 1987, when copies of the removal documents were filed. Mr. Bourland moved for default judgment in the circuit court on June 19, 1987. The federal court remanded the case to the circuit court on June 24, 1987, after finding that Allstate had failed to file the removal documents with the circuit court "promptly" as required by 28 U.S.C.A. § 1446(e) to effect removal. Thereafter, the circuit court entered a default judgment against Allstate. The principal question is whether the circuit court should have refused default judgment because an answer had been filed in the federal court within the time prescribed by Rule 12(a) for answering in the circuit court. Mr. Bourland cross-appeals from the circuit court's ruling that he is not entitled to an attorney fee and penalty pursuant to Ark.Code Ann. § 23-79-208 (1987). We hold the court correctly entered the default judgment and that it was not error to refuse the fee and penalty. We affirm on appeal and on cross-appeal. At a hearing on the default judgment motion, the attorney representing Allstate testified that copies of the removal documents were prepared for filing with the circuit clerk and that she directed her secretary to place them in the mail to the circuit clerk. An affidavit of the secretary to the effect that she did so on May 21, 1987, was presented. The attorney testified that

file-marked copies of the pleadings were returned to her by mail from the federal court, but there was no testimony that any such copies were returned to her from the circuit clerk's office. Counsel for Mr. Bourland presented a copy of a letter from Allstate's attorney to a lawyer representing a plaintiff in a companion case, which was removed to the federal court, arising out of the same accident. The letter showed copies of the removal petition and related documents were being sent to the circuit clerk with a copy of the letter to counsel. By a similar letter, dated May 21, 1987, Allstate's lawyer gave notice to Mr. Bourland's lawyer of the attempted removal. However, it contained no indication that a copy of the letter and copies of the documents it enclosed were mailed to the circuit clerk. By comparison of these letters, Mr. Bourland sought to show that the mailing to the circuit clerk had not taken place.

An affidavit from the circuit clerk was presented, in which she stated that she received no answer in the case before June 16, 1987, and received only the "documentation . . . to be filed . . . on June 17, 1987." In the order declaring Allstate in default, the circuit judge found as a matter of fact that no notice of removal was filed with the circuit clerk until June 17, 1987.

Allstate contends the circuit court erred in failing to consider the answer filed in the federal court sufficient to satisfy the requirement of Ark.R.Civ.P. 12(a) that an answer be filed within 30 days. Alternatively, Allstate contends the default should have been set aside pursuant to Ark.R.Civ.P. 55(c) due to "excusable neglect, unavoidable casualty, or other just cause."

1. Default

Allstate is unable to cite, and we have been unable to find, any case in which there was a remand from the federal to the state court where it was held that a state court must treat a pleading filed in the federal court as having been filed in the state court for any purpose. Mr. Bourland has been unable to cite any authority, and we know of none, holding that a default judgment must be entered where a case has been remanded from the federal court to the state court after, and by reason of, a failure to comply with the requirement of 28 U.S.C.A. § 1446(e) that removal papers be promptly filed in the state court in order to effect the removal.

Prior to a change in the federal law which occurred in 1949, an order of the federal court to which removal was sought was required to complete removal. A party seeking to remove was required to meet state court filing requirements until the removal was approved by the federal court or run the risk of being in default in the state proceedings if removal were refused by the federal court. The leading case discussing this change in the law is *Hopson v. North American Ins. Co.*, 71 Idaho 461, 233 P.2d 799 (1951). *See also Allen v. Hatchett*, 91 Ga.App. 571, 86 S.E.2d 662 (1955). The enactment of § 1446(e) made it clear that removal was effected by the removing party's compliance with the statute, and no federal court order was required to effect removal. The party seeking to remove has it in his or her power to deprive the state court of jurisdiction merely by compliance with the provisions of § 1446(e). While there is no longer a need to comply with state court filing deadlines to avoid default if the case is removed to the federal court, it is clear that

removal is not effected unless the removal documents are filed promptly with the state court.

In each of the cases cited by Allstate on this point, removal was effected by a proper filing in the federal and state court, but the case was remanded because the federal court found that it lacked jurisdiction. They hold that the time period in which responsive pleadings are due in the state court is tolled from the time the removal petition is filed until the case is remanded to the state court. The *Allen* and *Hopson* cases, cited above, are typical of such holdings. Another case cited by Allstate is a reported trial court decision, *Edward Hansen, Inc. v. Kearny Post Office Associates*, 166 N.J.Super. 161, 399 A.2d 319 (1979), in which the question was whether, after remand of a properly removed case, the state court could permit the pleadings previously filed in the federal court to stand in the subsequent state court proceedings. Citing *Ayres v. Wiswall*, 112 U.S. 187, 5 S.Ct. 90, 28 L.Ed. 693 (1884), the judge noted that, "[f]ollowing a remand the effect to be given to pleadings filed in the federal court is a matter of state policy and is not subject to federal determination." 166 N.J.Super. at 165, 99 A.2d at 321. He then held he could accept the federal court pleadings as it would not prejudice the parties and would save duplication of effort.

As noted above, the case before us is not like the New Jersey case or the others cited because here no removal had been effected. We therefore cannot say that the filing deadline in the circuit court was tolled. We agree with the New Jersey judge that the question presented is one of state policy. We are certainly not required by federal law to give the answer filed in federal court

the effect of meeting the filing deadline required by our rule, so we look to our own policy.

In the *Hansen* case, the New Jersey judge cited our decision in *Trinity Universal Ins. Co. v. Robinson*, 227 Ark. 482, 299 S.W.2d 833 (1957), where we dealt with a case which had been removed and then remanded and the parties had agreed that an answer filed in the federal court would be treated as if it had been filed in the state court. Our holding was that other answers, as to which no such agreement had been reached, would not be so treated. Apparently no filing deadline question was involved. While that decision may be somewhat instructive of our policy, it does not solve the problem with which we are faced here.

This court has always held that default judgments are not the law's favorites. *See, e.g., Burns v. Shamrock Club*, 271 Ark. 572, 609 S.W.2d 55 (1980). Perhaps our most recent important default judgment decision is *Tapp v. Fowler*, 291 Ark. 309, 724 S.W.2d 176 (1987), in which we held failure to file an answer within ten days of a ruling denying motions for dismissal and summary judgment did not place a party in default despite the requirement of Ark.R.Civ.P. 12(a). We said, citing *Cammack v. Chalmers*, 284 Ark. 161, 680 S.W.2d 689 (1984), that there had been no failure to appear in the action, and we would not place form over substance. The case before us is similar to those in the sense that it was shown that Mr. Bourland's counsel had knowledge of the answer filed in the federal court. There, however, the similarity ends. Allstate filed nothing in the state court within the allotted 30 days. Although it had appeared and defended in the federal court, it had not done so in the state court.

We have been strict in our interpretation of Rule 55 where there has been a failure to make any sort of timely filing or appearance in the trial court. In *Webb v. Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988), we held that a default judgment was required where the answer was filed after the time limit had run, even though the plaintiff had received a copy of the answer before the time ran out. We noted that the rule says default judgment "shall" be entered in that instance. *See also Declerk v. Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982). We see no difference between that strict policy and the policy which should be applied in the case of failure to file removal documents within the time allowed for answer or otherwise "promptly." The trial court, like the plaintiff, is entitled to be informed of the status of litigation before it, or not before it as the case may be. It is not asking too much to require litigants or counsel to see to it that if the state court is to be deprived of jurisdiction the very instrument by which that is to be accomplished is filed there.

2. *Excusable neglect, unavoidable casualty, or other just cause*

The circuit court denied Allstate's motion to set the default judgment aside for excusable neglect or unavoidable casualty as permitted by Rule 55(c). Allstate cites *Winters v. Lewis*, 260 Ark. 563, 542 S.W.2d 746 (1976), for the proposition that the motion should have been granted because there was reason for counsel to believe that there had been compliance with the filing requirement. In that case, an answer was filed, but then a second, amended, complaint was filed and served on the defendant's counsel. It was shown that the original answer was not

stricken, the plaintiff waited some three months to take the default judgment, and defendant's counsel had some reason to believe that the second service was of a copy of the complaint which had already been answered. These facts might have constituted excusable neglect, but we did not say so. We held rather that there was "substantial compliance" with the filing requirement and that the delay resulted in waiver of the filing requirement. We cannot say either of those things here.

Also cited is *Perry v. Bale Chevrolet Co.*, 263 Ark. 552, 566 S.W.2d 150 (1978). There the defendant's uncontroverted affidavit stated he had been assured by the plaintiff that the case against him would be dismissed before the time for answer ran. Upon learning that the case was not to be dismissed, the defendant drafted a handwritten answer which he attempted to file the day before the time ran out. His attempted filing was rejected due to a local court rule requiring that pleadings be typewritten. He filed a typewritten answer one day late. We held there was "excusable neglect or other just cause." We find this case distinguishable, because there had been timely personal contact with the court clerk in an attempt to file the answer. In *Declerk v. Tribble, supra,* which is more like the case before us now, we held that it was not excusable neglect for counsel to place the blame on a secretary who allegedly covered with other papers an answer which was ready to be filed and waiting on the lawyer's desk. As in this case, nothing was filed with the trial court within the prescribed time limit. While there is nothing wrong with using the mail to send a pleading to the court, our rules do not permit filing by placing a pleading in the mail.

We cannot say the trial court erred in refusing to set aside the default judgment.

3. *Attorney fee and penalty*

A plaintiff must recover the exact amount claimed against an insurance company to be able to take advantage of Ark. Code Ann. § 23-79-208 (1987) which allows recovery of an attorney fee and penalty. *Cato v. Arkansas Municipal League Municipal Health Benefit Fund,* 285 Ark. 419, 688 S.W.2d 720 (1985); *Farm Bureau Ins. Co. v. Paladino,* 264 Ark. 311, 571 S.W.2d 86 (1978). In his complaint, Mr. Bourland alleged Allstate was liable under its policy number 015-446-992 with expiration date of May 19, 1987, for $25,000 for wrongful death, $4,190.35 medical bills, and $6,500 for the loss of the reasonable value of the automobile. The total thus sought, absent the attorney fee, interest, and penalty, was $35,690.35. The court awarded $34,953.85.

Mr. Bourland argues that after he learned of the insurance policy's provisions, he sent a demand letter to Allstate seeking precisely the amount which was ultimately awarded by the court, but that he refused to amend his complaint to state that amount as he feared it might somehow alter his prevailing position on the issue of default.

We agree with Allstate's argument; Mr. Bourland cannot have it both ways. As he sought from the court more damages than he was awarded, he is not entitled to the penalty.

Affirmed on appeal and affirmed on cross-appeal.

PURTLE and HAYS, JJ., dissent.

HAYS, Justice, dissenting.

In this case, a copy of the answer filed with the District Court was sent to the opposing counsel within the time allowed by Rule 12. The copy sent to the attorney met the requirements for proper service under ARCP 5. There is absolutely no dispute that this pleading was received, and that opposing counsel had notice of the filing as well as the contents of the pleading. For this reason I cannot agree with the conclusion reached by the majority.

While the language of Rule 12 states that the answer is to be filed rather than served, that is not dispositive of the issue. The Reporter's Notes to Rule 12 state, with regard to that point:

> 5. Rule 12 substitutes the word "file" for serve and requires that the responsive pleading be filed within the time prescribed by this rule as opposed to serving the pleadings as is the case under FRCP 12. By using this *terminology*, it is believed that arguments can be avoided as to when a pleading was served. (My emphasis).

The language in the Notes, referring to the use of filing over service as a choice of "terminology," plainly suggests that the filing of the answer is not a requirement, but rather, merely the determinative factor when the issue of timeliness of service arises. Furthermore, there is nothing in this comment that suggests than an answer that is served in a timely fashion will not fulfill the requirements of the rule if the filing is out of time.

Rule 12 was altered from the form used in the Federal Rules, not for an innate preference for filing as opposed to service, but for the purpose of avoiding disputes when the issue of timeliness over service arose. When there is no dispute as to the date of service of the answer, there is no need to resort to the date of filing to make a determination as to the timeliness of the pleading. When actual notice by way of service is given to a party and there is absolutely no dispute as to the timeliness of that service, common sense directs that the filing provision of Rule 12 should prevail.

We have repeatedly held that default judgments are not favored by the courts and should be avoided when possible. *Tapp v. Fowler,* 291 Ark. 309, 724 S.W.2d 176 (1987); *Cammack v. Chalmers,* 284 Ark. 161, 680 S.W.2d 689 (1984); *A.O. Smith Harvestore Products, Inc. v. Burnside,* 282 Ark. 27, 665 S.W.2d 288 (1984); *Winters v. Lewis,* 260 Ark. 563, 542 S.W.2d 746 (1976); *Perry v. Bale Chevrolet Co.,* 263 Ark. 552, 566 S.W.2d 150 (1978). We have further found that substantial compliance by a defendant is sufficient to avoid the harshness of a default judgment in several instances. *Winters v. Lewis, supra; Perry v. Bale Chevrolet, supra; Cummings v. Lord's Art Galleries,* 227 Ark. 972, 302 S.W.2d 792 (1957); *Easley v. Inglis,* 233 Ark. 589, 346 S.W.2d 206 (1961). While the language of "substantial compliance" was not used specifically, that was essentially our holding in two more recent cases, *Tapp v. Fowler, supra* and *Cammack v. Chalmers, supra.* Substantial compliance has been our way of defining a situation where we found that the rules had been complied with sufficiently to satisfy the rule and its purpose, and where a different holding would lead to obvious injustice.

I have no difficulty in concluding that the timely service of the answer in this case was substantial compliance with Rule 12. Given the circumstances of this case and the comments explaining Rule 12, it is clear that the rule and its purpose have been satisfied. As we stated in *Tapp v. Fowler, supra,* in reversing a default judgment that had been granted on technically correct, but unsupportable grounds, "To hold [otherwise] would defy common sense, and, at a minimum, place form over substance."

PURTLE, Justice, dissenting.

I disagree with the majority on the appeal and cross-appeal. If we affirm on appeal we should reverse on cross-appeal because the amount awarded was exactly the same amount the appellee offered to take prior to trial.

It is undisputed that the appellant filed a timely removal action and gave actual notice to the appellee's attorney. The appellant furnished adequate proof that it promptly mailed the removal papers to the state court. Not one person has been misled by the failure to file the removal papers in the state court. In truth, the facts support the theory that the state court failed to properly file the removal papers as strongly as they do the theory that the appellant's lawyer failed to mail them. A logical conclusion is that the postal service lost them.

A common sense approach to this problem is to allow the time the case is pending in federal court to suspend the running of time within which to file in the state court. Upon remand to the state court time should commence where it left off. If the case had not been remanded, the answer would never have been required to be filed in the

state court. Obviously the federal court was looking for an excuse to remand when it discovered that the removal papers had not been filed in the state court. Placing form over substance does not further justice in this case.

In spite of the failure by the appellant to see that the removal papers were placed in the correct file in the state court, we could still grant relief and do justice by applying the "other just cause" provision of ARCP, Rule 55(c). That's exactly what we did in *Tapp v. Fowler,* 291 Ark. 309, 724 S.W.2d 176 (1987), where we reaffirmed our holding in *Cammack v. Chalmers,* 284 Ark. 161, 680 S.W.2d 689 (1984), allowing a late answer to be filed. We stated: "To hold on the facts before us that the appellant failed to appear or otherwise defend appellee's action would defy common sense, and, at a minimum, place form over substance." We reversed and remanded with directions to set aside the default judgment.

Our procedures allow pleadings to be mailed to the courts, and allows extra time when the mail service is utilized. See ARCP Rule 6(d). A statement by an attorney that he has correctly addressed and mailed a pleading with proper postage is evidence that he has complied with this rule. Attorneys are not insurers or guarantors of delivery of the United States mail. Sometimes we strain at a gnat and swallow a camel. The court just did.

I would have the default judgment vacated and order the case tried on its merits.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

KEN BOURLAND, Individually and as Administrator of the JODI BOURLAND ESTATE — PLAINTIFF

V. NO. J-C-87-124

ALLSTATE INSURANCE COMPANY — DEFENDANT

ORDER

(Filed Jul 24, 1987)

Pending now is the motion of the plaintiffs, Ken Bourland, et al, to remand this action to the Circuit Court of Craighead County, Arkansas, Eastern District. For the reasons that follow the plaintiffs' motion is granted.

The complaint in this action was filed in the state court on April 22, 1987. Twenty-nine (29) days later, on May 21, 1987, the defendant, Allstate Insurance Company, filed its answer, petition for removal, notice of removal and removal bond in this court. Nothing was filed by the defendant in the state court, however, until June 17, 1987, a delay of twenty-six (26) days, at which time a copy of the petition for removal was submitted to that court. The plaintiffs now move for remand arguing that the defendant failed to comply with the procedural requirement of the removal statute, 28 U.S.C. § 1446.

Under § 1446(b) a defendant may file a petition for removal within thirty (30) days of its receipt of the initial pleading in the state court action. Promptly after the filing of the petition for removal, the defendant must file a copy of the petition with the state court. 28 U.S.C. § 1446(e). The plaintiff argues that the delay of twenty-six (26) days between filing the petition for removal in this court and the filing of a copy of the petition in state court

is a procedural defect which entitled it to remand. The defendant, on the other hand, asserts that the delay was inadvertent, that § 1446 was "substantially" complied with, and that, therefore, removal was proper.

It has been consistently held in this jurisdiction that removal statutes must be strictly construed, resolving all doubts in favor of state court jurisdiction. *Barnes v. Southwestern Bell Telephone Co.*, 596 F.Supp. 1046 (W.D. Ark. 1984); *Estate of Fitzpatrick v. Brehm* 580 F.Supp. 731 (W.D. Ark. 1984); *Capeheart-Creager, etc. v. O'Hara & Kendall Aviation*, 543 F.Supp. 259 (W.D. Ark. 1982); *Keller v. Carr*, 534 F.Supp. 100 (W.D. Ark. 1981); *Strange v. Arkansas-Oklahoma Gas Corp.*, 534 F.Supp. 138 (W.D. Ark. 1981); *Friddle v. Hardee's Food Systems, Inc.*, 534 F.Supp. 148 (W.D. Ark. 1981). In deference to these precedents the court declines to hold either that the defendant "substantially" complied with the requirements of § 1446(e), or that "substantial" compliance is sufficient to effect removal. Rather, the court finds that the twenty-six (26) day delay here was not prompt within the meaning of 28 U.S.C. § 1446(e), and holds that removal of this action was improper.

Accordingly, IT IS HEREBY ORDERED that this action should be, and is hereby, remanded to the Circuit Court of Craighead County, Arkansas, Eastern Division.

This 23 day of July, 1987.

/s/ Henry Woods
HENRY WOODS,
U. S. District Judge

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 7-24-87 by MKF.

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS EASTERN DISTRICT

KEN BOURLAND, Individually, and as Administrator of the JODI BOURLAND ESTATE — PLAINTIFF

v. — NO. CIV-87-26

ALLSTATE INSURANCE COMPANY — DEFENDANT

ORDER

(Filed Aug 6, 1987)

On Monday, August 3, 1987, plaintiff's motion for default came on to be heard and the court finds as follows:

1. That on April 24, 1987, plaintiff filed his complaint in the Circuit Court of Craighead County, Eastern District.

2. That on May 21, 1987, defendant filed its answer, petition for removal, and bond for removal in the United States District Court, Eastern District of Arkansas, Jonesboro Division.

3. That the notice of removal and petition for removal were not filed with the Circuit Court of Craighead County, Eastern District, until June 17, 1987.

4. That defendant is in default in the Circuit Court of Craighead County, Eastern District.

5. That a trial on the issue of damages will be held at a later date.

IT IS THEREFORE ORDERED, that defendant, Allstate Insurance Company, is in default, and that a jury trial on the issue of damages will be held at a later date.

DATED this 6 day of August, 1987.

/s/ Gerald Pearson
Circuit Judge

APPROVED:

/s/ David Rees
Attorney for Plaintiff

BARRETT, WHEATLEY, SMITH & DEACON

/s/ Barry Deacon
Attorneys for Defendant

IN THE CIRCUIT COURT OF
CRAIGHEAD COUNTY, ARKANSAS

KEN BOURLAND, Individually, and as Administrator of the JODI BOURLAND ESTATE — PLAINTIFF

VS. — NO. CIV 87-26

ALLSTATE INSURANCE COMPANY — DEFENDANT

JUDGMENT

(Filed Oct 8, 1987)

On this 11th day of September, 1987, the above referenced case comes on for a presentation of damages liability on the default having already been determined. The plaintiff appeared by and through his attorneys, Rees Law Firm, David Rees, and the defendant appeared by and through their attorneys, Barrett, Wheatley, Smith and Deacon and Friday, Elderidge [sic] & Clark. The case was presented and after reviewing all of the pleadings on file, hearing arguments of counsel, and listening to proof through the testimony of witnesses on behalf of the plaintiff and the defendant the court finds as follows:

1. That this court has jurisdiction of the subject matter and the persons involved.

2. That the plaintiff in his capacity as administrator of the Jodi Bourland estate shall have judgment against the defendant in the amount of $27,965.60. That Ken Bourland individually shall have judgment against the defendant in the amount of $6,988.25.

3. That the plaintiff's petition for penalty, interest, and attorney's fees is denied.

IT IS THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED that the plaintiff, Ken Bourland in his representative capacity as administrator of the Jodi Bourland estate have judgment against the defendant in the amount of $27,965.60; that Ken Bourland individually have judgment against Allstate in the amount of $6,988.25 for a total judgment of $34,953.85; that the plaintiff's petition for penalty, interest and attorney's fees be denied; and that all costs incurred be taxed on the defendant.

ENTERED this 8 day of October, 1987.

/s/ Olan Parker, Jr.
CIRCUIT JUDGE

APPROVED AS TO FORM:

/s/ David Rees
DAVID REES
ATTORNEY FOR PLAINTIFF

/s/ Barry Deacon
BARRY DEACON
ATTORNEY FOR DEFENDANT

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
Little Rock, AR 72201

November 7, 1988

Leslie M. Steen
Clerk

Kit Acklin
Deputy

Robin Henthorne
Chief Deputy

Rae W. Millerd
Deputy

Melissa Fuller
Chief Deputy

Greta Ribens
Deputy

Janie Owen
Deputy

Allen Waters
Deputy

Denise Parks
Deputy

William H. Sutton
Attorney at Law
2000 First Commercial Building
Little Rock, AR 72201

Re: 88-26 Allstate Insurance Company v. Ken Bourland

Dear Mr. Sutton:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied. Purtle and Hays, JJ., would grant."

Sincerely yours,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS/rh

cc: David Rees
Pat Fleetwood
(#CIV87-26)